No. 18,681

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HEINRICH FRITZ BACHMANN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLANT'S REPLY BRIEF.

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Introduction.

The appellant has set forth his contentions in his opening brief. However, to clarify his position, and in answer to the brief by appellee, he adds the following in support of his appeal to become a United States citizen.

ARGUMENT.

I.

Heinrich Fritz Bachmann Was Never Relieved From Military Service as a Treaty Alien.

Appellee contends that a finding as to whether appellant Bachmann was a conscientious objector would be neither relevant nor material (Gov. Br. 17). We feel this finding is both relevant and material, because

if appellant was a conscientious objector, and if the appeal board decided to classify him V-A because he was a conscientious objector, then obviously he was not relieved from military service as a treaty alien, and Section 315 of the Immigration and Nationality Act does not apply.

As indicated in our opening brief on page 7, the appeal board, when faced with a request for I-O classification shall first determine whether the registrant is eligible for classification in a class lower than class I-O, which here obviously was the case. V-A classification does not mean that a person is unconditionally not subject to military service, but that he will not be called unless certain circumstances exist. This Court may well take judicial notice of the fact that persons with a V-A classification were called during World War II to render service in the Armed Forces of the United States.

If classification in Class V-A is automatic as the government contends (Gov. Br. 10), then why was this reclassification not taken care of by the local draft board, which on November 24, 1953 determined that "information does not warrant reopening, forward on appeal" [Govt. Ex. C, 1-C], since he had then been twenty-six years of age since November 4, 1953? There was no change of circumstances between November 24, 1953 and December 29, 1953, when the appeal board reclassified him V-A.

The sketchy Selective Service notations [Govt. Ex. C, 1-C] are not very helpful in determining the facts on which decisions were based.

II.

Section 315 INA Is a Penalty Clause and as Such Required the Safeguards of the Fifth and Sixth Amendments to the United States Constitution, and It Was a Denial of Due Process to Impose on Bachmann the Burden of Proof to Show That He Did Not Violate Said Clause.

That the denial of citizenship is a penalty is reinforced by the case of *Petition for Naturalization of Koplin* (1962), 204 F. Supp. 33 where the Court on page 36 states in referring to Section 315(a) of the Immigration and Naturalization Act, Title 8 U. S. C. A. §1426(a):

> "Surprisingly, the courts have construed this provision so as to require that the waiver be made with intelligence and knowledge. Moser v. United States, 341 U.S. 41, 71 S.Ct. 553, 95 L.Ed. 729; In re Planas, D.C., 152 F. Supp. 456 (1957). *The apparent reason for departing from the general rule that one is presumed to know the law and that singing of a document such as this concludes the matter, is the fact that such waiver forms are usually executed by aliens who have little understanding of our customs, mores, law and language, and who are thus apt to lack a realization that by a stroke of the pen they are forever renouncing a most precious status.* Machado v. McGrath, 89 U.S. App.D.C. 70, 193 F.2d 706." (Emphasis ours.)

Here we have a clear statement by the Court that there is a departure from the general rule of the presumption of knowing the law under circumstances applicable to the case at bar. The Court implies that the

burden of proof is on the government to show that the alien understood what he was doing. In our case there is a complete failure of proof in that respect.

The Court continues in the *Koplin* case, *supra,* on the same page:

> "In Moser v. United States, supra, the Supreme Court of the United States first established a standard for gauging whether the waiver was an intelligent one. In that case, the Supreme Court, speaking through Mr. Justice Minton, said: '. . . Considering all the circumstances of the case, we think that to bar petitioner, nothing less than an intelligent waiver is required by elementary fairness. Johnson v. United States, 318 U.S. 189, 197 [63 S.Ct. 549, 553, 87 L.Ed. 704]. To hold otherwise would be to entrap petitioner.' *In citing Johnson v. United States, Judge Minton was comparing this waiver to the waiver of the privilege against self-incrimination and this analogy has been followed in subsequent cases.*" (Emphasis ours.)

This is additional evidence that Section 315 INA is considered a penalty clause, since the United States Supreme Court applies the standards applicable to criminal cases.

In the *Koplin* case the Court continues:

> "In Ballester Pons v. United States, 220 F.2d 399 (1 Cir., 1955), the Court recognized the standard of 'intelligent waiver' and evaluated the Moser decision in these words: ' * * * But the Supreme Court read into § 3(a) the implication that the bar to naturalization would not operate until

the alien had made an intelligent choice between the alternatives presented, *well knowing the legal effect of what he did* * * *'

In Brunner v. Del Guercio, 259 F.2d 583 (9 Cir., 1958), there was a reversal because of the failure of the Board of Immigration Appeals to 'find that Brunner knowingly and intentionally waived his rights to citizenship when he executed the Selective Service form.' " (Emphasis ours.)

In the instant case we have evidence that he was informed of the existence of the law, that he was handed a copy of the law, but nowhere is there a scintilla of evidence that he understood what the law meant, or that he was aware of the consequences of his letter of October 9, 1953 to his draft board requesting exemption as a treaty alien.

The *Koplin* case continues on pages 36 and 37:

"Machado v. McGrath, 193 F.2d 706 (D.C.Cir., 1951), also recognized the significance of the Moser decision, and added this comment:

' * * * The sound reason for affording such an opportunity arises in good part from our conviction that American citizenship being a most precious right, its denial should not be allowed to rest upon a doubtful premise. Upon similar reasoning, it should not be allowed in this case to rest upon the narrower view of the allegations of the complaint. We hold that appellant is entitled to a responsive pleading on the issue of mistake.' "

This statement holds that the Selective Service records should not be conclusive on the issue of mistake.

It is interesting to compare Sections 314 and 315 INA in regard to the ineligibility to become a citizen of the United States. We find that in the case of deserters and draft dodgers there must be conviction by court martial or by a court of competent jurisdiction. In the case of aliens who apply for and are relieved from training and service on the ground of alienage, the records of the Selective Service System or of the national military establishment are to be conclusive as to whether the alien was relieved from such training and service on the ground of alienage.

Conviction for draft evasion is not a prerequisite to the operation of this sanction in the case of an alien relieved from service because of alienage. Independently of prosecution, forfeiture of rights to citizenship attaches when the statutory set of facts develop, without any administrative or judicial proceedings.

To alien deserters and draft dodgers the safeguards of the Fifth and Sixth Amendments of the United States Constitution are granted. As to an alien who attempts to be relieved on the ground of alienage we see that only the Selective Service records are sufficient, and it is submitted that this is unconstitutional since there is no rational reason for depriving these aliens of the safeguards of due process.

In the case of *Kennedy v. Mendoza-Martinez* (1963), 372 U. S. 144, 83 S. Ct. 554, we find a detailed

analysis of the Congressional intent. We find that Congress intended all the legislation which deprives citizens of citizenship or bars non-citizens from becoming citizens, to be penal in nature. Having concluded that a penalty has been intended, then there is no question but that the safeguards of due process must be observed.

We submit that Congress may subscribe or impose conditions for admission to citizenship but not even Congress may deprive a permanent resident alien of the privilege of citizenship without allowing him a fair opportunity to be heard. Naturalization is a judicial proceeding. A hearing is given to the alien. Section 315 INA takes away the right of the alien to a hearing since the Selective Service records are conclusive evidence of exemption from military service.

These records are not based on an administrative hearing which would allow an alien an opportunity to expose his opinion or express his views. The Selective Service appeal board makes its determination from the record of the draft board. Again, we do not have in fact an administrative hearing. Therefore, not only are the safeguards of the Fifth and Sixth Amendments to the United States Constitution withheld from such an alien, but the protection of due process as well, inasmuch as no hearing is given to him in the administrative stage of the proceedings.

III.

Appellant Had No Opportunity to Make an Intelligent Election Between Exemption and No Citizenship, and No Exemption and Citizenship, and Furthermore, as a Conscientious Objector, He Was Entitled to Be Exempt From Military Service Because of His Religious Beliefs.

The government contends that there is evidence to show intelligent choice on the part of appellant. (Gov. Br. 14-15.) As evidence it says that there had been an interview on September 22, 1953, and that at that time appellant stated that he could not decide whether he would sign the statement requesting exemption as a treaty alien. However, looking at this purported evidence, there is no reference either in the cover sheet [Govt. Ex. C, 1-C] or in the unsigned memorandum [Govt. Ex. C, 1-E] that Section 315 INA was shown to, or that it was even discussed with the appellant, nor is there a reference to whether the appellant understood the consequences which would result if he signed a statement requesting exemption.

The government supports its contention, which it considers more than an inference, by the letter from the Director of the Selective Service System, Mr. Hershey. (Gov. Br. 14.) However, Mr. Hershey states in the letter that the action on the part of the appellant "might" bar him from citizenship.

The government's next piece of "evidence" (Gov. Br. 14) is the letter of the New York City Director of Selective Service, Candler Cobb [Govt. Ex. C, 1-G], relating an interview between Colonel Akst of his office and the appellant. The government contends that the

appellant was apprised by Colonel Akst of Section 315 INA during this interview. If we read the letter we see that this statement is incorrect. We find in it the following statement:

> "He was thereupon advised that he could make up his own statement and he would be eligible for IV-C classification, but that he would be either given or mailed Section 315 of the McCarren Act."

Nowhere in the letter do we find that he was apprised of the contents of Section 315 of the McCarren Act or that he understood the consequences of said Act.

The government contends that on October 9, 1953 appellant went and filed his letter requesting exemption as a treaty alien, and that he was at that time handed a copy of Section 315 INA. (Gov. Br. 15.) On this point we agree with the government. The notation for October 9, 1953 of Government's Exhibit C, 1-C states, "Section 315 of the I & N Act handed to registrant". Where in this notation is there an indication that registrant read the Section 315, that he understood the meaning of it, or that he was fully apprised of the consequences? The complete record of the Selective Service System [Govt. Ex. C] up to this date is completely silent on this point.

The purported evidence given by the government in its brief is only a series of inferences based on inferences drawn from the sketchy notations and files of the Selective Service System.

IV.

The Findings of the District Court Were Not Sufficient.

Even the government apparently concedes (Gov. Br. 17) that the case of *Brunner v. Del Guercio,* 259 F. 2d 583 (9th Cir. 1958) was not followed by the District Court in its findings of fact as to whether under the facts of the case appellant had the opportunity to make an intelligent election between exemption and no citizenship, and no exemption and citizenship. On the issue of opportunity for intelligent waiver the Finding of Fact only says [R. 62]:

> "IV That the petitioner was informed by his local draft board of the provisions of Section 315 of the Immigration and Nationality Act (8 U.S.C. 1426) which provided that he would be ineligible for naturalization if such exemption was granted to him for that reason."

There is nowhere in this finding an allegation that he understood the information and the full impact thereof. "Informing", consisting merely of handing him a copy of the section, without more, is obviously inadequate. The District Court's conclusion of law is therefore not supported by the evidence, or by the finding of fact.

It is submitted that this case should not be remanded to the District Court for making further findings, but that this Court, in considering the overwhelming weight of the evidence, should find that appellant had no opportunity to make an intelligent choice, and therefore is not barred from citizenship, and therefore that the District Court should be directed to admit appellant to United States citizenship.

V.

Permanent Resident Aliens Are Treated Like Citizens in That They Have the Same Unqualified Obligation to Render Military Service as Do Citizens.

While the government quotes Executive Order No. 10292 of September 25, 1951 (Gov. Br. 18), and states that the President may exempt treaty aliens, the government does not quote the Executive Order of February 17, 1956, No. 10659, 21 F. R. 1103 as to permanent resident aliens, made by the President at that time by virtue of the enabling statutes.

In 32 C. F. R. 326 in section 1622.42(b) we find the following statements:

> "In Class IV-C shall be placed any registrant who is an alien and who has not been admitted to the United States for permanent residence but who has remained in the United States for a period exceeding one year and who has, prior to his induction, made application to be relieved from liability for training and service in the Armed Forces of the United States by filing with the local board an Application by Alien for Relief from Training and Service in the Armed Forces (SSS Form No. 130), executed in duplicate. The local board shall forward the original of such form to the Director of Selective Service through the State Director of Selective Service and shall retain the duplicate in the registrant's Cover Sheet (SSS Form No. 101)."

Said order was made by the President by virtue of the enabling statutes of the 1948 Act, as amended on June 19, 1951, 50 U. S. C. A. Appendix, Sec. 454(a).

It was not the Congressional intent in enacting Section 315 of the INA to bar from citizenship those aliens who are erroneously exempted from military service through the misunderstanding of the law by the Selective Service System, or that errors by the Selective Service System should penalize the alien. The laws in this country are made for the protection of the people and not to entrap the innocent, who should not suffer a penalty as a result of the lack of knowledge and understanding of the law by an agency of our government.

Conclusion.

For the reasons stated, it is submitted that the appellant Bachmann is entitled to be admitted to United States citizenship.

Dated, Los Angeles, California, December 27, 1963.

Respectfully submitted,

MILAN MOACANIN,
Attorney for Appellant.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the 9th Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Milan Moacanin